No. 11532.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

JOSEPH J. CUMMINS,
739 South Hope Street, Los Angeles 14,
Attorney for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

PAGE

I.

Consideration of appellee's statement of facts 1

A. Material errors in appellee's statement of facts 1

B. Appellee's statement of the facts as hereinabove corrected confirm the basis of appellant's assignment of errors 5

II.

Appellee's brief presents no conflict of fact nor was any conflict of fact before the trial ~~court~~ court on the motion for a new trial 9

A. The Government's contention that appellant's statements were confined to a letter is totally unsupported by the evidence 9

B. Appellee's excerpted quotations from the recorded telephone conversations presents no contradiction to the evidence submitted by appellant 12

C. The affidavit of Howard H. Davis presents no contradiction to the evidence submitted by appellant 16

III.

Appell~~ant~~ee's authorities on newly discovered evidence are not applicable to the case at bar 19

IV.

The trial court erred in denying the motion for a new trial on the ground of newly discovered evidence of two convictions for theft by Hubert Tomsone, the Government's chief witness 24

V.

The trial court erred in striking the testimony of Fred Skill and preventing him from completing his testimony 26

VI.

The evidence is ~~sufficient~~ insufficient to support the verdict 27

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Bracher v. United States, 149 F. (2d) 742	21
Evans v. United States, 122 F. (2d) 461	22
Long v. United States, 139 F. (2d) 652	21
Martin v. United States, 17 F. (2d) 973	23
People v. Skaggs, 80 A. C. A. 93	22
Pettine v. Territory of New Mexico, 201 Fed. 489	23
Pittman v. United States, 42 F. (2d) 793	25
Roberts v. United States, 137 F. (2d) 412	21
United States v. Johnson, 327 U. S. 106	19, 20, 21
United States v. Miller, 61 Fed. Supp. 919	23
United States v. Reid, 49 Fed. Supp. 313	22

Statutes

Civil Procedure, Sec. 2051	24
Federal Rules of Criminal Procedure, Rule 26	24

No. 11532.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

Consideration of Appellee's Statement of Facts.

A. Material Errors in Appellee's Statement of Facts.

Appellee has inadvertently made several material errors in its statement of the facts of this case which, because of their importance, we deem it necessary at the outset to call to the Honorable Court's attention.

1. Appellee's statement that the defense made no request to have the proposed witnesses appear in person at the hearing upon the motion for a new trial is erroneous.

On page 16 of its brief, appellee in describing the proceedings of the hearing of the motion for a new trial states: "No request was made by the defense to have any of the proposed witnesses appear in person * * *." Actually counsel for appellant specifically requested the Court to bring all of said witnesses into Court, but the

same was denied by the trial court. This fact was inadvertently overlooked by counsel for the Government, who has conceded the same to counsel for appellant since the submission of appellee's brief.

2. Appellee's statement that the motion for a new trial was submitted upon the affidavits of Joseph J. Cummins and Howard H. Davis is erroneous.

This statement of appellee is contained on page 16 of its brief. As pointed out in appellant's opening brief, and as is specifically shown in the transcript, the motion was submitted also upon the transcript of the recorded telephone conversations between Joseph J. Cummins, appellant's new counsel, and Drs. M. J. Hurst, David Levine, Charles Strachan, Theodore Kane, and Colonel Strayder. [Tr. pp. 19-[illegible]] This fact is conceded by appellee in a subsequent portion of its brief (p. 17), but we deem it necessary to call the Honorable Court's attention to this error in the earlier portion of appellee's brief because of the important context in which it is there contained.

That the Government's purported counter-affidavit designated "Affidavit of Howard H. Davis in Opposition to Motions Made by Defendant" raises no actual conflict of fact material to the issues presented by the motion for a new trial, and that no issue of settlement of facts was involved nor were any findings of fact made upon said motion, is considered in detail in a later portion of this brief. (See Sec. II, B and C.)

3. Appellee's statement to the effect that the appellant kept the money received from Tomsone for a period of time, instead of promptly reporting to the proper authorities is erroneous.

This misstatement appears on pages 45 and 46 of appellee's brief, wherein appellee's counsel himself demonstrates how it prejudiced the witness, Dr. Strachan. This error *was also made by said counsel in his argument to the jury at the close of trial.* [Tr. p. 341.]

The *only* testimony in the case and in the record as to the time elapsing between appellant's return to his office and his apprehension and arrest therein by the Federal Bureau of Investigation is that of appellant to the effect that he was only in his office *"a couple of minutes"* [Tr. p. 257] before he was arrested, and that he intended to "go to Dr. Long (the Chief of the Out-Patient Department) and put it on his desk and say, 'Now hear the whole story,'" [Tr. p. 257] but was prevented from so doing because he was arrested so quickly. [Tr. p. 260.] *This testimony is absolutely uncontradicted.*

In his argument to the jury after the close of the case, the Government's counsel in referring to appellant, stated:

> "But he walks into his office, there was a patient in his office, 10 or 15 minutes go by before the FBI apprehends and arrests him and they find him red-handed with this money in his pocket." [Tr. p. 341.]

While we feel that this error of the Government's counsel was the result of mere inadvertence, we feel constrained to call it to the Honorable Court's attention because of its prejudicial effect to appellant, both in the eyes of the jury in reaching their verdict and in the eyes of the witnesses as shown by appellee's own brief regarding Dr. Strachan. (Appellee's Br. p. 45.)

That this error must have prejudicially influenced the jury in arriving at its verdict is vividly illustrated by

the reaction thereto of the witness, Dr. Strachan, as demonstrated by the Government itself on page 45 of its brief, wherein counsel for the Government quotes a portion of the telephone conversation between Joseph J. Cummins and Dr. Strachan. The entire statement of Dr. Strachan on this subject was as follows [Tr. p. 29]:

> "Dr. S.: And there's another thing that kind of weakens the case, and that is that it was important enough for him to go downstairs to get a cup of coffee when there were a lot of patients waiting; it was important enough for him to go out to his car to get some papers that he was working on, while there were patients waiting, but after he had the money in his pocket, there were a lot of patients waiting in the hall and they were more important than getting rid of the guilt—getting rid of the money . . . and that is a hard thing to beat.
>
> JJC: That's a hard thing to try to make a jury swallow.
>
> Dr. S: That's right. I think *that* was the thing that swung the jury." (Italics ours.)

Counsel for the Government then contends on page 45 of appellee's brief:

> "We feel that there is considerable weight in the above-quoted observation of Dr. Strachan. Dr. Strachan's observation is most logical. *The jury probably reasoned likewise.*" (Italics ours.)

It is submitted that the reason that the jury reasoned likewise and did not believe appellant's excuse or explanation was due to the aforesaid inadvertent error on the part of counsel for the prosecution.

B. Appellee's Statement of the Facts as Hereinabove Corrected Confirm the Basis of Appellant's Assignment of Errors.

As stated in appellant's opening brief, appellant's contention was and is that the prosecution's chief witness, Hubert Tomsone, whose reputation for truth, honesty and integrity was severely attacked at the trial, attempted to bribe him, that he was conducting an investigation of Tomsone, that he took the one hundred dollars ($100.00) from Tomsone as part of his scheme of entrapping him, and that the entire conviction rests on the testimony of said Tomsone since the only evidence of *solicitation* and *intent* was the testimony of Tomsone himself as to secret conversations had solely between Tomsone and appellant, that (1) appellant, rather than Tomsone, was the solicitor of the bribe, and (2) that appellant had the intent to have his decision and action influenced thereby.

On page 43 of appellee's brief the Government itself states: "The Government concedes that the case against appellant is based largely on the testimony of the witness Tomsone." Actually it rests *solely* on the testimony of Tomsone, since there is no other evidence whatsoever of solicitation and intent on the part of appellant.

In Section IV of appellee's brief (pp. 43-46) the Government sets forth the few alleged facts which it characterizes as "corroboration of the testimony of Tomsone." One of these alleged corroborative facts is that the appellant kept the money he had obtained from Tomsone for a period of time, instead of promptly reporting the same to the proper authorities. As hereinabove pointed out, this statement is not true, but is the result of an inadvertent error on the part of counsel for the prosecution.

The remaining allegedly corroborated facts were all admitted in appellant's opening brief. On page 44 of its brief the Government states that Mr. Duncan, Assistant Manager, testified that he witnessed Dr. Gage and Mr. Tomsone meeting each other on October 3, 1946, at the corner of Wilshire and Sawtelle Boulevards and then have lunch together at the Mayfair Cafe in Santa Monica. However, Mr. Duncan also testified that he did not hear any of the conversations between Dr. Gage and Mr. Tomsone. [Tr. p. 184.] Therefore, any evidence of intent or solicitation must still be based upon the sole testimony of Tomsone. The mere physical fact of the meeting falls directly in line with appellant's contention that he was investigating and trying to entrap Tomsone.

On the same page the Government states that Mr. Duncan testified that he talked to Mr. Tomsone with respect to matters Mr. Tomsone reported that were transpiring between Dr. Gage and Tomsone. However, there is no testimony in the case as to any of the contents of such conversation.

On page 44 of its brief the Government states that Dr. Long testified that either during the latter part of September or early part of October, 1946, Mr. Tomsone called to his attention the conversation that he, Tomsone, had with Dr. Gage. First, this was not the testimony of Dr. Long. Dr. Long testified that Tomsone, sometime either in the latter part of September or early in October of 1946, came to him and discussed with him "a matter that he wanted to call to his attention with regard to conversations he had had with Dr. Gage." [Tr. p. 114.] This does not infer that Dr. Long had a discussion with Tomsone regarding any specific conversation with Dr.

Gage, as inferred in the paraphrased statement of Dr. Long's testimony contained in appellee's brief. Furthermore, there is no evidence in the case as to any of the contents of the conversation or discussion between Dr. Long and Tomsone.

Appellee on page 44 of its brief then refers to the testimony of Agent Davis of the FBI regarding the physical facts of Dr. Gage going to the auto park with Tomsone, the fact that Gage took the one hundred dollars ($100.00) from Tomsone, and that the serial numbers thereof checked with the serial numbers taken therefrom prior to the incident. All this is admitted in appellant's opening brief, and it was there and is now again submitted that all of these physical facts are consistent with appellant's contention that he was investigating and trying to entrap Tomsone.

It is therefore clear that there is no evidence, direct or otherwise, in the case corroborative of Tomsone's testimony regarding solicitation and intent on the part of appellant. Since the above constitutes all the allegedly corroborative evidence of Tomsone's testimony set forth in appellee's brief, the conclusion is inescapable that the entire conviction rests upon the sole testimony of Tomsone as to conversations between himself and appellant at which no other persons were present. This is fatal to the Government's case. It is one of the major factors establishing an abuse of discretion by the trial court in denying the motion for a new trial to allow the newly discovered evidence to get to the jury, which, under said circumstances, would quite probably shift the delicate balance of reasonable doubt to the favor of appellant. It is also one of the major reasons for requiring a reversal upon the ground

that the evidence in the case is insufficient to sustain the verdict and judgment.

Actually, the corroboration is all in favor of appellant because of the inherent improbability of Tomsone's testimony as to said secret conversations in the light of the following uncontradicted facts set forth in appellant's opening brief, which are not attacked in the Government's brief:

1. At the time appellant is accused of engaging in bribery activities in return for a continuous weekly stipend, the uncontradicted evidence shows that he intended to and did file documents for resignation from said Veterans' Administration.

2. Tomsone's testimony is to the effect that appellant commenced to solicit him for a bribe the second time appellant had ever met him, which was only four days after the admitted bitter argument between appellant and Tomsone.

3. Although Tomsone testified that the basis of the alleged bribe was the promise of appellant to overprescribe and thereby increase the sale of orthopedic shoes, the uncontradicted evidence shows that appellant asked for and was assigned two other doctors in his department to assist him, each of whom had the same authority as appellant to independently examine and prescribe shoes.

4. That appellant originally accepted his position with the Veterans' Administration as a temporary and interim position until he passed the California State Board Medical examination.

II.

Appellee's Brief Presents No Conflict of Fact nor Was Any Conflict of Fact Before the Trial Note C on the Motion for a New Trial.

The evidence presented by appellant on his motion for a new trial on the newly discovered evidence phase is contained in the affidavit of Joseph J. Cummins and the transcript of the recorded telephone conversations between said Joseph J. Cummins and Drs. Hurst, Levine, Strachan, Kane and Colonel Strayder, which establish that during the period that appellant is accused of engaging in bribery activities, appellant had on numerous occasions stated to certain of the doctors at the Veterans' Administration, among other things, that he felt Tomsone was "paying somebody off" and that he, appellant, was trying to get him; that appellnt was always complaining about Tomsone's work and was investigating the same; and that appellant was undertaking an investigation and finding out certain things and that, as a consequence, there would probably be some "fireworks" or "fur flying." [Tr. pp. 19-60.]

A. The Government's Contention That Appellant's Statements Were Confined to a Letter Is Totally Unsupported by the Evidence.

On pages 19 and 20 of its brief the Government contends the statements that Dr. Gage was making an investigation and that there would be "fur flying" or "hell popping" were confined to a letter written by appellant to Washington. This is merely a conclusion on the part of the Government and is not borne out by the facts.

First, the newly discovered evidence is not confined to statements of an investigation and that there would be

"fur flying" or "hell popping." Such statements as he, appellant, felt Tomsone was paying somebody off, and that he was trying to get Tomsone, and that appellant was always complaining about Tomsone's work and was checking on that, cannot possibly have any relation to said letter, as a reading of said letter will quickly reveal.

Furthermore, a complete reading of the transcript of said telephone conversations shows that the only person who regarded Dr. Gage's reference to "hell popping" or "fur flying" as pertaining to the letter to Washington, was Dr. Kane. None of the other witnesses even referred to or mentioned the letter at all during their entire conversations except Dr. Levine, and Dr. Levine specifically stated that Dr. Gage's statements regarding "fireworks" and "fur flying" were *not* in reference to the letter. We refer the Honorable Court to Dr. Levine's actual statements at pages 36 and 37 of the transcript:

> "JJC: Well, I mean state that he had stated to Dr. Levine in the presence of others that he had written a letter to Washington and that there was going to be some 'fire works.'
>
> Dr. L: Well I wouldn't say it along that—that as a consequence of the letter—there was going to be some 'fire works.'
>
> JJC: Oh! . . . How did he put it, doctor?
>
> Dr. L: Oh, he told me—well he mentioned even before that—as I recall it—that he had apparently hit upon something . . . and that he was going to follow it through.
>
> JJC: Uh huh.

Dr. L: And that subsequently that there would probably be something along that line, but I don't recall—

JJC: Uh huh.

Dr. L: That *wasn't* said in reference to his letter to Washington." (Italics ours.)

The fact that the remaining witnesses did not even mention the letter in their conversations shows either that Dr. Gage did not mention the letter to them, or that they did not connect his said statements with the letter.

Even the testimony of Dr. Kane, referred to at length in appellee's brief, can offer no solace to the Government, for he testified that Dr. Gage was always complaining about the quality of Tomsone's work and that Dr. Gage stated to him that he was checking on *that.* (Italics ours.) [Tr. p. 58.] This statement clearly refers to an investigation by appellant regarding Tomsone and his work.

On page 19 of its brief the Government quotes from Agent Davis' affidavit regarding Dr. Hurst:

> "Dr. Hurst, did know that Dr. Gage had said that he was investigating something and a day or so later he, Dr. Gage, had said that he had written a letter to Washington."

Even taken at face value, this quotation itself merely shows that Dr. Gage stated he had written a letter to Washington. It certainly does not indicate that the investigation was in reference to the letter. But further, a reading of the actual conversation between said Dr. Hurst and Joseph J. Cummins [Tr. pp. 54-56] discloses that Dr. Hurst made no reference to the letter whatsoever dur-

ing said entire conversation, which indicates that Dr. Hurst at that time did not interpret the reference to an investigation to be in connection with the letter. Finally, in the same recorded telephone conversation Dr. Hurst specifically stated that Dr. Gage told him that he, Dr. Gage, felt Tomsone was "paying somebody off" and that he was "trying to get him." [Tr. p. 54.] Clearly, this latter statement can have no possible connection with the letter.

B. Appellee's Excerpted Quotations From the Recorded Telephone Conversations Presents No Contradiction to the Evidence Submitted by Appellant.

The Government on pages 24-28 of its brief sets forth various excerpted portions of the aforementioned recorded telephone conversations between Joseph J. Cummins and Drs. Kane, Strachan, Levine, and Strayder. It does not quote any portions of Dr. Hurst's conversation.

A complete reading of all these conversations will disclose that they contain evidence to the effect that during the period that appellant is accused of engaging in bribery activities appellant had on numerous occasions stated to various doctors in the Veterans Administration, among other things, that he felt Tomsone was "paying somebody off" and that he was trying to get him; that he was always complaining about Tomsone's work and was investigating same; that he was undertaking an investigation and that, as a consequence, there would probably be some "fireworks" or "fur flying."

Obviously, as said transcript of the conversations shows, some of these statements were made by appellant to certain of said doctors, some were made to other of said doc-

tors, and some were made to all of said doctors. Not all of the statements were made nor did appellant ever contend they were all made to all of said doctors. Appellant's opening brief correctly assigns the specific statements to the specific doctor or doctors who made them. This appears on pages 13-23 of appellant's opening brief, wherein portions of the actual transcribed recorded conversations are set forth. The total of said evidence is also correctly set forth in appellant's opening brief.

The Government's technique in attempting to attack these statements by excerpted quotations from these telephone conversations consists of ~~asking~~ quoting specific questions of each individual witness upon those specific matters which that witness was not attributed by appellant to have made, and thus naturally obtaining a negative answer thereto. The excerpted quotations in the Government's brief do not contradict the specific statements attributed to the proper witness by appellant and therefore do not attack any of the evidence submitted by appellant upon the motion for a new trial or in its opening brief. The Government has merely set up straw men and then proceeded to knock them down.

The Government has quoted small portions of the testimony of Drs. Kane, Strachan, and Levine, in which they testify that they do not recall appellant stating to them specifically that he was being bribed by Tomsone. Appellant never contended that this specific statement was made by said Drs. Kane, Strachan, or Levine.

The specific statements regarding the fact that Tomsone was paying somebody off and that Dr. Gage was trying to get him were made by Dr. Hurst [Tr. p. 54] and Dr. Colonel Strayder. [Tr. p. 49.] The Govern-

ment does not set forth any quotations of Dr. Hurst that such statement was not made by him. The Government attempts to avoid this statement by stating that Dr. Hurst, when subsequently interviewed by Davis of the Federal Bureau of Investigation, repudiated his statement. It is significant to note that this conclusion is submitted by the Government, in its own language, "without further comment." (Appellee's Brief p. 28.) The specific statement by Dr. Hurst as contained in his conversation with Joseph J. Cummins was made at a time when he was unaware of the fact that it was being recorded. A reading of Agent Davis' affidavit will show that, even under the fear and awe of severe cross-examination by an agent of the Federal Bureau of Investigation, Dr. Hurst did not actually repudiate this statement.

The Government's excerpted quotations from Dr. Colonel Strayder's conversation (Appellee's Br. pp. 27, 28), does not give the true picture thereof. Actually, Dr. Strayder did not refute the statement that Dr. Gage told him that Tomsone was paying somebody off. We quote his statements from page 49 of the transcript:

> "JJC: Did he express himself that he thought perhaps Tomsone was sticking there because he was paying somebody off?
>
> Dr. S.: Well, he didn't know.
>
> JJC: He told me he told *you* that prior to his arrest.
>
> Dr. S.: He might have mentioned it to me."

The remaining excerpted quotations from these telephone conversations contain questions directed to Drs. Kane, Strachan, and Levine as to whether Dr. Gage ever told them that Tomsone was trying to bribe him. Appel-

lant never contended that these specific individuals gave such testimony in these recorded telephone conversations, and consequently the negative answer which the Government ~~obtained~~ quotes is not contradictory to the evidence submitted by appellant. However, these doctors did testify to the other vital statements ~~evidence~~.

Dr. Kane, upon whom the Government dwells at great length on pages 24 and 25 of its brief, did specifically state that appellant was always complaining about the quality of Tomsone's work, and that Dr. Gage told him he was checking on that. [Tr. pp. 58, 26.] This is not contradicted by the Government.

Dr. Strachan, whose excerpted portion of the conversation is quoted on page 26 of appellee's brief, did testify that appellant on more than one occasion made the statement that he was working on something and that one of these days "hell will be popping" or there will be "fur flying" or words to that effect. [Tr. pp. 52-53.] This is not contradicted by the Government.

Dr. Levine, the next person who is quoted in appellee's brief (p. 26), did state that appellant was always complaining about how bad Tomsone's shoes were, appellant told him that he, Dr. Gage, was going to do something about it; that appellant stated to him that there was "something fishy in Denmark" and that he was finding out certain things that were going on and that, as a consequence, there would probably be some fireworks. This is not contradicted by the Government. [Tr. pp. 33-35.]

Dr. Hurst further stated that Dr. Gage on several occasions stated that he was making an investigation and that there might be "fur flying" or "hell popping" or

words to that effect. [Tr. p. 54.] This is not contradicted by the Government.

Dr. Levine further testified that Dr. Gage told him he had apparently hit upon something and was going to follow it through. [Tr. p. 37.] This is not contradicted by the Government.

We wish, in passing, to refer to the Government's reference to Dr. Kuhn's refusal to testify contained on page 27 of appellee's brief. The Government states that Dr. Kuhn merely showed a disposition to not testify. As shown by the two recorded telephone conversations between Dr. Kuhn and Joseph J. Cummins, set forth in full on pages 21-23 of appellant's opening brief, Dr. Kuhn's reaction was not merely of a disposition not to testify, but was based upon fears of pressure, influence, and complications. We refer the Honorable Court to said portion of appellant's brief. The Government further states that, though affiant Cummins told Dr. Kuhn he might have to subpoena him, no subpoena was ever obtained. The reason no subpoena was ever obtained was because the trial court refused Affiant Cummins' request to have said witnesses appear in person in Court, as heretofore pointed out.

C. The Affidavit of Howard H. Davis Presents No Contradiction to the Evidence Submitted by Appellant.

The excerpts from Davis' affidavit and a discussion thereof is contained in pages 28-30 of appellee's brief. We respectfully request the Honorable Court to read the entire affidavit of Howard H. Davis appearing on pages 61-68 of the transcript. A full reading thereof will disclose that said affidavit is nothing more than a repetition

of the identical matter contained in the excerpted quotations from the recorded transcriptions set forth on pages 24-28 of appellee's brief, which we have just considered. It merely repeats the same question and responses of each specific witness that are contained in appellee's excerpted quotations from the telephone conversations, which, as we have just considered, merely present denials from each specific witness only of statements which appellant never contended that specific witness made. It does not contradict any statement of any particular witness which was attributed to that witness by appellant, and therefore does not contradict the aggregate evidence submitted as contended by appellant. It is the straw man technique again.

An inspection of the Davis affidavit will also reveal that the statements therein are only compared with and directed against the Cummins affidavit. The Cummins affidavit is merely a short document referring to and combining and paraphrasing the complete recorded telephone conversations of all the proposed witnesses. It does not purport nor attempt to assign the particular statements to the proper witnesses, as this was left to the transcription of the recorded conversations itself which was submitted upon the motion for a new trial. The Davis affidavit cannot, therefore, contradict the Cummins affidavit, because the Davis affidavit refers to specific statements of specific individuals and the Cummins affidavit does not distinguish between the various persons who made the specific statements.

When the Davis affidavit is compared with the transcript of the complete recorded telephone conversations, wherein the specific statements are assigned to the proper persons who made them, it will be found that the Davis affidavit merely takes from the excerpted quotations of the telephone conversations set forth at pages 24-28 of the Government's brief the specific statements which are there shown not to have been made by the specific witness referred to. They are therefore the same statements which, as just analyzed in subsection B of this section II hereof, appellant never contended the specific witnesses who disclaim them ever made. And in the identical manner as the Government's said excerpted quotations, the Davis affidavit does not contradict or deny any specific statement made by the person to whom it was properly assigned by appellant, and therefore does not contradict or deny, in any respect, the aggregate evidence submitted by appellant.

Because of the foregoing, an analysis of the Davis affidavit and its total lack of contradiction to the evidence submitted by appellant would be identical with our analysis and conclusions of the Government's excerpted quotations which we have already set forth in subsection B of Part II of this brief. We therefore refer the Honorable Court to that portion of this brief, since it would serve no useful purpose to unduly lengthen this brief at this point by what would of necessity be an almost identical repetition thereof.

III.

Appellee's Authorities on Newly Discovered Evidence Are Not Applicable to the Case at Bar.

The case of *U. S. v. Johnson,* 327 U. S. 106, cited by appellee and considered at length in its brief is not applicable to the case at bar. In that case motions for a new trial were made on the ground that one Goldstein, a Government witness, had perjured himself. As stated in appellee's brief, numerous affidavits by both the defendants and the Government were presented upon the motion for a new trial. The trial court considered all these affidavits and *found* that Goldstein had not perjured himself, and on such finding denied the motions for a new trial. The Circuit Court reviewed all said affidavits *de novo* and made a contrary finding of fact therefrom that Goldstein had perjured himself and therefore reversed the trial court's said findings of fact.

The Supreme Court held that the trial court had made a *Finding of Fact* upon the motion for a new trial that Goldstein had not perjured himself and, since there was sufficient evidence in the affidavits to support the trial court's findings of fact, the appellate court should not substitute its findings of fact for that of the trial court.

That the Supreme Court decision applies only to a review of a ruling upon a motion for a new trial when the review is sought on the alleged ground that the trial court made erroneous findings of fact, is clearly pointed out by the italicized portions of the following quotations from the

Supreme Court decision, as set forth in the Government's own brief (pp. 22-23):

> "Since we think it important for the orderly administration of criminal justice that *findings on conflicting evidence* by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari.
>
> "* * * But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial *when such review is sought on the alleged ground that the trial court made erroneous findings of fact. Holmgren v. United States,* 217 U. S. 509; *Holt v. United States,* 218 U. S. 245; *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U. S. 474, 481. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, *cf. United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 247; *Glasser v. United States,* 315 U. S. 60, 87, it should never do so where it does not clearly appear that the findings are not supported by any evidence."
>
> "The circuit court of appeals was right in the first instance, when it declared that it did not sit to try *de novo* motions for a new trial. It was wrong in the second instance when it did review the *facts de novo* and order the judgment set aside." (Italics ours.)

The Government itself, in discussing the *Johnson* case, discloses this point on page 23 of its brief, where it states "a motion for a new trial should not be granted when such review is sought on the alleged ground that the trial court made erroneous findings of fact. It is only when the findings of fact are wholly unsupported by evidence that such a motion should be granted."

The *Johnson* case is therefore not applicable to the case at bar for the following reasons:

1. The Government's counter-affidavit of Howard H. Davis, as heretofore considered, does not contradict a single fact presented by the affidavit of Joseph J. Cummins, and the transcription of the recorded telephone conversations upon which the newly discovered evidence portion of the motion for a new trial was based. There was therefore no evidence before the trial court on the motion for a new trial contridictory to that submitted by appellant.

2. The trial Court did not make any findings of fact that Dr. Gage did not make any of the statements set forth in said document or that any of the witnesses did not make the statements presented, nor did the trial Court base its denial of said motion upon any such ground.

On pages 32-35 of its brief the Government sets forth numerous cases regarding the Court's discretion in denying a motion for a new trial. These cases in effect hold that the granting of a new trial on the ground of newly discovered evidence is discretionary with the trial Court and will not be disturbed on appeal in the absence of an abuse of discretion. In this respect the Government cites *Long v. United States* (139 F. (2d) 652), *Bracher v. United States* (149 F. (2d) 742), and *Roberts v. United States* (137 F. (2d) 412). Appellant has not and does not now attack this principle. Appellant's ground for appeal from the denial of the motion for a new trial on the ground of newly discovered evidence is based on the ground that the trial Court abused its discretion under the facts and circumstances of the instant case. This is clearly set forth in Appellant's Opening Brief.

The Government also cites *Evans v. United States* (122 F. (2d) 461) and other authorities to the effect that the alleged newly discovered evidence must be such that it probably would change the result. As heretofore pointed out in Appellant's Opening Brief under the circumstances of this case where the sole evidence of appellant's intent and solicitation of bribery rests upon the sole word of a man whose credibility and reputation was seriously attacked at the trial as to conversations had between himself and appellant and at which no other persons were present, it was an abuse of the trial Court's discretion to refuse a new trial to enable the vital proffered evidence to be submitted to the jury. We believe that said evidence, in the light of the aforesaid circumstances and the inherent improbability of Tomsone's testimony, would definitely shift the delicate balance of reasonable doubt to the favor of appellant.

The jury is entitled to have this vital evidence placed before it.

The Goverment cites *United States v. Reid,* 49 Fed. Supp, 313, and other cases to the effect that a new trial is not warranted by affidavits of allegedly newly discovered evidence designed only to impeach a witness. The evidence of appellant's statements and disclosures to the various doctors at the Veterans' Administration is not merely impeaching evidence. It is the very basis of appellant's defense to the effect that he did not have the intent of which he was charged. (*People v. Skaggs,* 80 Adv. Cal. App. 93, 108.)

The Government contends that a new trial will not be granted for newly discovered evidence which is merely cumulative. The evidence of appellant's statements to the various doctors is not cumulative but is entirely new

testimony and goes to the very basis of appellant's defense. Furthermore, a motion for a new trial for newly discovered evidence which is based upon falsification or mistake, as in the case at bar, will not be denied merely because the testimony is cumulative.

Martin v. United States, 17 F. (2d) 973;
United States v. Miller, 61 Fed. Supp. 919;
Pettine v. Territory of New Mexico, 201 Fed. 489.

The Government contends that a new trial will not be granted on the ground of newly discovered evidence unless there is a showing that said evidence could not have been produced before the trial began. First, the recorded telephone conversation between Joseph J. Cummins and Dr. Ralph H. Kuhn [Tr. pp. 45-47] make a vivid showing of the fears and pressure that existed and that the evidence of the remaining doctors could not have been obtained except under the circumstances of recording their telephone conversations when they were unaware of the same. Second, it is a fundamental principle of law in the Federal Courts that a new trial will be granted upon the ground of newly discovered evidence when a witness of the original trial admits that he committed perjury *or even that he was mistaken in his testimony. Martin v. United States,* 17 F. (2d) 973; *United States v. Miller,* 61 Fed. Supp. 919. Under such circumstances no showing need be made as to why the evidence was not obtained before trial since perjury or mistake during trial cannot be determined before trial.

IV.

The Trial Court Erred in Denying the Motion for a New Trial on the Ground of Newly Discovered Evidence of Two Convictions for Theft by Hubert Tomsone, the Governments Chief Witness.

The records of the two convictions for theft referred to in the affidavit of Joseph J. Cummins are misdemeanors and not felonies. However, this does not render them inadmissible.

The Government's contention that a witness cannot be impeached by the record of a conviction for crime unless the same is a felony, is a statement only of the California law and the Government cites and relies upon Section 2051 of the California Code of Civil Procedure for this contention. (Appellee's Br. pp. 35-36.)

However, California State law on this subject is not applicable in the case at bar. *Rule 26 Federal Rules of Criminal Procedure* provides:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The Advisory Committee Notes to this rule state:

> "2. This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, Rule 43(a)), in that this rule contemplates a uniform

body of rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law and, therefore, results in a divergence as between various districts. Since in civil actions in which Federal jurisdiction is based on diversity of citizenship the State substantive law governs the rights of the parties, uniformity of rules of evidence among different districts does not appear necessary. On the other hand, since all Federal crimes are statutory and all criminal prosecutions in Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another."

Under the federal rules the record of a conviction of crime is admissible for the purpose of attacking the credibility of a witness if the conviction is a felony, an infamous crime or a crime involving moral turpitude. (*Pittman v. United States,* 42 F. (2d) 793, 795.) It is not limited to felonies. Clearly a crime of theft is one involving moral turpitude.

Furthermore, the question of said convictions arose during the testimony of Fred Skill, whose testimony was interrupted and stricken upon the Court's own motion on the ground that it was too remote. Skill was testifying as to the general reputation and character of the witness Tomsone and was about to base part of his testimony upon said convictions. The records of said convictions

are therefore also admissible to corroborate this testimony of Fred Skill if the Court should rule that his testimony was improperly stricken and also to show that the testimony of Fred Skill was not too remote since it was based partially upon said convictions of a crime involving moral turpitude.

V.

The Trial Court Erred in Striking the Testimony of Fred Skill and Preventing Him from Completing His Testimony.

The nature of Fred Skill's testimony has been set forth in detail in Appellant's Opening Brief. The Government's only answer to this is that the ruling thereon is within the discretion of the trial Court. It is appellant's contention that the trial Court did abuse its discretion in this matter.

The testimony of Fred Skill which was excluded, when taken together with the two War Veterans, whose testimony was admitted, is conclusive that Tomsone had not changed his character in the last twelve years, and thus it was prejudicial error to strike the testimony of Skill.

The abuse of the trial Court's discretion is exaggerated under the circumstances of the case at bar, since Tomsone was the chief Government witness, without whose tsetimony the defendant could not have been convicted. The jury was entitled to have before it the character and reputation for truth and veracity of the witness twelve years ago, as well as at the time of the trial.

VI.

The Evidence Is Sufficient to Support the Verdict.

On this point the Government cites authorities to the effect that an appellant court will rarely substitute its views on the weight of the evidence for those of the jury. The contention of appellant is that the only direct evidence in the case that appellant had the necessary intent rests upon the sole word of Hubert Tomsone. The proven bad reputation of Tomsone and the inherent improbability of his testimony as to said conversations has already been considered. Because of this there is actually no evidence in the case of intent upon which the verdict and judgment can be sustained.

Respectfully submitted,

JOSEPH J. CUMMINS,
Attorney for Appellant.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of December, A. D. 1947.

12-8-47—35